STATE OF MICHIGAN

IN THE SUPREME COURT

CHRISTOPHER D. BENTFIELD,

Plaintiff/Appellee,

vs.

BRANDON'S LANDING BOAT BAR and DAVID WATTS, INC., a Michigan Corporation,

Defendants/Appellants.

Case No. 127515

MI Court of Appeals
Case No. 248795

Oakland Co. Circuit Court
No. 02-039613 NO
HON. COLLEEN A. O'BRIEN

/

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PLAINTIFF/APPELLEE'S SUPPLEMENTAL BRIEF OPPOSING

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PLAINTIFF/APPELLEE'S SUPPLEMENTAL BRIEF IN OPPOSITION TO APPEAL FROM JUDGMENT

I. INTRODUCTION

Plaintiff/Appellee filed his initial Brief in Opposition to Appeal from Judgment on or about December 15, 2004 in response to Defendant/Appellant's Application for Leave to Appeal to this Honorable Court. On June 17, 2005, this Honorable Court issued an Order instructing the clerk to schedule oral argument on whether to grant the application or take other peremptory action. Per this Order, the parties were instructed that they may file supplemental briefs discussing the issue of the "standard of review when a trial court denies a motion for reconsideration that alleges a new cause of

action that was available prior to the court's original ruling." This document is Plaintiff/Appellee's Brief on that matter.

II. STATEMENT OF ORDER BEING APPEALED AND RELIEF SOUGHT

Plaintiff relies on his statement provided in his initial Brief in Opposition to Appeal from Judgment.

III. STATEMENT OF QUESTION PRESENTED

DID PLAINTIFF/APPELLEE'S MOTION FOR RECONSIDERATION FOLLOWING THE TRIAL COURT'S RULING ON DEFENDANT/APPELLEE'S SUMMARY DISPOSITION MOTION ALLEGE A NEW CAUSE OF ACTION?

Plaintiff/Appellee answers "No."

Defendants/Appellants answer "Yes."

Trial Court answered "Yes."

Court of Appeals answered "No."

IV. STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Plaintiff/Appellee relies on the content in his initial Brief in Opposition to Appeal from Judgment.

V. SUPPLEMENTAL ARGUMENT IN SUPPORT OF DENYING LEAVE TO APPEAL

The court rule regarding motions for reconsideration, MCR 2.119(F)(3) provides:

> Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

The standard of review for an appellate court reviewing a motion for reconsideration is an abuse of discretion standard. Kokx v Bylenga, 241 Mich App 655, 659; 617 NW2d 368 (2000); Churchman v Rickerson, 240 Mich App 223, 233; 611 NW2d 333 (2000). Some factors that are commonly used by trial and appellate courts to determine whether an abuse regarding the grant or denial of a motion for reconsideration are:

- has the matter has been presented in a different light or under different circumstances
- has there been a change in governing law
- has a party offered new evidence not available at the time of the original motion
- does the court need to correct its own errors
- will manifest injustice result
- was the issue inadequately briefed when first contemplated by the court

56 AmJur2d, Motions, Rules, and Orders, §41 Reconsideration.

Violation of a statute, such as the violation of MCL 554.139 alleged in the instant case, creates an inference of negligence on the part of the defendant. Zeni v Anderson, 397 Mich 117, 129; 243 NW2d 270 (1976). Therefore, a statutory violation is not a separate cause of action. Instead, it is evidence in support of the underlying negligence cause of action.

Furthermore, a statutory violation does not need to be specifically plead in order to be raised. Crawford v Palomar, 7 Mich App 21, 26; 151 NW2d 236 (1967); Purcell v Johnson, unpublished decision per curiam of the Court of Appeals decided [July 11, 1997] (Docket No. 188673) (Exhibit 6 of Plaintiff's initial Brief in Opposition). As long as a party pleads enough facts to put the opposing party on notice of the nature of the claim, the statute is deemed raised.

MCL 554.139 imposes a statutory duty upon owners and lessors of residential property to maintain that property so the premises and all common areas are fit for the use intended by the parties and keep the entire premises in reasonable repair. MCL 554.139. As Plaintiff/Appellee has previously pointed out, the open and obvious doctrine cannot be used to avoid this or other specific statutory duties. Woodbury v Bruckner, 467 Mich 922, 922; 658 NW2d 482 (2002); O'Donnell v Garasic, 259 Mich App 569, 581-582; 676 NW2d 482 (2004); Jones v Enertel, Inc., 467 Mich 266, 270; 650 NW2d 334 (2002).

Under current, longstanding Michigan law, no new cause of action was alleged in Plaintiff/Appellee's motion for reconsideration at the trial court level. Violation of a statute raises an inference of negligence and is not a separate cause of action. Plaintiff/Appellant did not have to specifically plead the statute in order for it to apply to the situation. Sufficient facts were plead to put the Defendant on notice of the nature of the cause of action and the Defendant/Appellant was well aware of it's landlord/tenant status relationship with the Plaintiff/Appellee. The statute applied merely by virtue of its existence. The Court of Appeals ruled that the trial court did commit a palpable error and abused its discretion when it granted summary disposition for Defendant without

taking into account the statutory violation. As stated by the Court of Appeals:

> The trial court in its denial of plaintiff's motion for reconsideration provided that the issue was "ruled upon previously by this Court either expressly or by reasonable implication." The trial court did not address "expressly or by reasonable implication" the elements of MCL 554.139, and, if it did, it errantly granted summary disposition in favor of defendants based on an application of the open and obvious danger doctrine.

(See Court of Appeals opinion, attached to Plaintiff/Appellee's initial Brief in Opposition, Exhibit 4, quotations in original.) By pointing out the landlord tenant statute in his motion for reconsideration, all Plaintiff did was afford the trial court the opportunity to correct its error. The trial court did not at all address the issue of the violation of the statutory duty or whether the open and obvious doctrine provided a defense to the violation of a statutory duty. This constituted an abuse of its discretion according to the Court of Appeals. The Court of Appeals concluded that the trial court granted summary disposition incorrectly to Defendants/Appellants on the basis of the open and obvious doctrine.

Furthermore, applying the factors generally used by courts in assessing motions for reconsideration, the motion in question should have been granted by the trial court. First, a contemporaneous change in the governing law was taking place at the time, due to the constant remands of the Woodbury case, as mentioned in detail below. Also, manifest injustice resulted from the trial court's denial of the motion, as Plaintiff was entitled to have his negligence claim decided correctly under the law, which the trial court did not do by ignoring the implications of the landlord/tenant statute. The Court of Appeals was correct in its decision when it stated that the trial court committed

"palpable error", i.e., abused its discretion. This Honorable Court should deny leave to appeal, as the Court of Appeals decided this issue correctly.

In the alternative, Plaintiff/Appellee submits that it was not entirely clear at the time he brought his Complaint, and even at the time he requested reconsideration of the summary disposition decision, that the landlord/tenant statute was a statute that could be used to negate the open and obvious doctrine. As the Court of Appeals pointed out in footnote 3 of its decision in the instant case, the Woodbury case that specifically held that a violation of MCL 554.139 could be used to negate open and obvious was decided December 26, 2002, almost a year after Plaintiff filed his Complaint. The Court of Appeals put forth another decision in the case, this one unpublished, on February 3, 2003. (See Court of Appeals unpublished decision in Woodbury, attached to this brief as Exhibit 1). Plaintiff's brief in opposition to summary disposition was filed on or about March 13, 2003, only one month after this unpublished opinion. Further, in actuality, at that time, it still was not entirely clear that the decisions of December 26, 2002 or February 3, 2003, would stand. The Woodbury case ended up back in front of this Honorable Court as late as December 29, 2003, eight months after the summary disposition decision in the instant case, at which time this Court denied reconsideration. Until the Woodbury case was completely resolved, Plaintiff could not be entirely certain that a specific allegation of the landlord tenant statute was available to him.

Moreover, Michigan has a policy of allowing liberal amendments to pleadings, even up to the time of trial. MCR 2.118(A). A motion to amend ordinarily should be granted, and denied only for particularized reasons, such as undue delay, bad faith or

dilatory motives. Fyke & Sons v Gunter Co., 390 Mich 649, 656; 213 NW2d 134 (1973). None of those reasons are applicable here. If the landlord tenant statute truly was a new issue, then Plaintiff/Appellee should have been permitted or instructed at the time of his motion for reconsideration to amend his Complaint to include the statutory violation so that the matter could be litigated in detail. No injustice would have resulted to Defendants/Appellants; the discovery needed to prosecute the claim would have been the same as the discovery for the negligence claim. Allowing Plaintiff to amend his Complaint at the time of the motion for reconsideration would avoid the manifest injustice Plaintiff suffered as a result.

A final point is that if the law on this issue was so clear at the time of Defendants' motion for summary disposition, perhaps their original motion itself was frivolous. MCR 2.116(F). Under that rule, sanctions should be assessed against Defendants/Appellants for having brought a motion so clearly contrary to the law on statutory violations and their interplay with the open and obvious danger rule. Leave to appeal should be denied in this case, as the Court of Appeals has corrected the wrong perpetrated on Plaintiff/Appellee by the trial court.

VI. CONCLUSION

Plaintiff/Appellee plead sufficient facts to put Defendants/Appellants on notice that his premises liability claim was brought by a tenant. Failure to specifically cite a statutory violation in a complaint is not fatal to an action. Plaintiff/Appellee brought forth no new cause of action in his motion for reconsideration; he merely pointed out to the trial court that the landlord/tenant statute had a bearing on this case, an issue which the trial court had previously ignored. As previously stated, Plaintiff/Appellee satisfied the

AmJur factors used by courts in deciding whether to grant motions for reconsideration. For instance, the law at the time regarding the interplay of the statutory warranty of habitability and the open and obvious danger doctrine was not settled due to the confusion in the courts regarding the Woodbury case. Therefore, the trial court blatantly abused its discretion and committed "palpable error" in denying Plaintiff/Appellee's motion for reconsideration. The Court of Appeals was correct in its earlier decision regarding this case. This Honorable Court should deny leave to appeal in the instant case and let the decision of the Court of Appeals stand.

VII. RELIEF REQUESTED

For the reasons set forth in this Supplemental Brief in Opposition to Appeal from Judgment and those reasons in Plaintiff/Appellee's original brief on this issue, Plaintiff/Appellee CHRISTOPHER D. BENTFIELD respectfully requests that this Honorable Court deny leave to appeal in this case and allow the decision of the Court of Appeals to stand.

Respectfully submitted,

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Dated: July 11, 2005
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